Filed 11/6/12 Moulton v. Penfold CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

KEN MOULTON, Plaintiff and Appellant, v. NEALE PENFOLD et al, Defendant and Respondent.	A135291 (Humboldt County Super. Ct. No. DR090696)

Ken Moulton (Moulton) sued Neale Penfold (Penfold) and three other defendants for professional negligence arising out of a construction project. The trial court sustained a general demurrer without leave to amend the second amended complaint (SAC) and this appeal followed.

The focus of this appeal is on the court's discretion in denying leave to amend the SAC. The trial court, in essence, determined that the SAC was a sham pleading concluding that Moulton had no possible causes of action against Penfold under any theory. We disagree.

I.
FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of the SAC, in 1992 Moulton hired Penfold, doing business as Penfold Engineering, for engineering work on his automobile and boat repair shop in Eureka. In May 2006 Moulton sought further services from Penfold and found him in the same office as sixteen years earlier. Penfold and Moulton entered into an oral agreement on a " 'handshake deal' " as they did in 1992. Also, at this time Penfold

introduced his son, Scott Penfold (Scott), to Moulton telling him that " 'this is the man who is going to be doing your project.' " There was nothing in the building or office to indicate that Scott was the owner of a separate entity, Penfold Engineering, Inc. (PEI). Most of Moulton's dealings were with Penfold, not Scott. Nothing suggested that a separate entity with Scott was involved. In August 2006, Moulton received a bill from Penfold Engineering, and when he attempted to pay, he learned the work was incomplete. In April 2007, Moulton threatened to cancel if the project was not completed within two weeks.

In May 2007 plans submitted to the City of Fortuna were rejected, with 114 defects needing corrections. The plans were resubmitted and again rejected, this time with 112 defects. At this point Moulton fired Penfold.

On August 12, 2009, Moulton filed an unverified complaint alleging a single cause of action for professional negligence against PEI, Scott, Alan Baird, and Alan Baird Engineering and Surveying, Inc., but not naming Penfold. During discovery Moulton learned that Penfold was not an officer, employee, or owner of PEI. Moulton had believed he was entering into an agreement with Penfold, doing business as Penfold Engineering, with Penfold as the senior engineer and Scott as the junior engineer. Moulton sought and was granted leave to add Penfold as a Doe defendant.

Following two demurrers, only one of which was heard, Moulton filed the SAC on July 19, 2011. The SAC also named Penfold, doing business as Penfold Engineering, as well as PEI. On February 3, 2012, the trial court sustained, without leave to amend, a demurrer to the SAC, and judgment was entered on March 1, 2012.

II.
DISCUSSION

1. The standard governing this demurrer.

"Our review of the sufficiency of a complaint against a general demurrer, which is de novo, is guided by long-settled rules. ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed."

[Citation.] . . .' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)" (*Fonseca v. Fong* (2008) 167 Cal.App.4th 922, 929.) In addition, we consider the complaint's exhibits. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.) "Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.' [Citation.] 'False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded . . . .' [Citations.]" (*Ibid.*)

"Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment; if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]' (*Blank v. Kirwan* [, *supra*,] 39 Cal.3d [at p.] 318.)" (*Fonseca v. Fong*, *supra*, 167 Cal.App.4th at p. 929.)

2. The SAC did not meet the legal definition of a sham pleading.

The trial court disregarded the allegations in the SAC as to Penfold. "[T]he material facts are those from the first amended complaint. . . . [¶] . . . [¶] . . . Particularly telling is the fact that plaintiff's initial complaint was alleged as to '[PEI].' This suggests to the court that the plaintiff did not regard . . . Penfold to be personally liable or that plaintiff relied on a purported partnership relationship in conducting the instant business transaction." Although the trial court acknowledged "this is a very close call," the court treated the SAC as a sham pleading as to Penfold and disregarded those material allegations.

Distilled to its essence, the argument is that since Moulton originally sued PEI and not Penfold in his unverified original complaint, he cannot now sue Penfold individually or doing business as Penfold Engineering as this contradicts an admission made in the

original complaint. We disagree that the sham pleading doctrine applies to the addition of Penfold as a party because Moulton adequately explained the addition of Penfold at the pleading stage.

"A complaint may plead inconsistent causes of action [citations], although it be verified, if there are no contradictory or antagonistic facts [citation]." (*Steiner v. Rowley* (1950) 35 Cal.2d 713, 718-719.) " 'Generally, after an amended pleading has been filed, courts will disregard the original pleading. [Citation.] [¶] However, an exception to this rule is found in *Lee v. Hensley* [(1951) 103 Cal.App.2d 697, 708-709], where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham.' [Citation.] The rationale for this rule is obvious. 'A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective.' [Citation.] Moreover, any inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations. [Citation.]" (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.)

For example, in *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, the plaintiff was struck by a motorist adjacent to the defendant's market. His original complaint alleged that the accident took place on the public street adjacent to the market, and the defendant owed him a duty of care because he was parked in the roadway so he could run into the store to buy a newspaper. (*Id*. at pp. 382-383.) Two successive demurrers were filed by the defendant arguing that the market owed no duty to plaintiff because he was injured in the public roadway and not on the defendant's property. Both demurrers were sustained with leave to amend. Plaintiff then filed a second amended complaint, but this time alleged that he was on the market's property when he was injured. (*Ibid.*)

The court rejected the new allegations, relying on an exception to the general rule that requires a court to assume the truth of pleaded facts in deciding the sufficiency of a demurrer. That exception applies "where a party files an amended complaint and seeks

to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.]" (*Owens v. Kings Supermarket*, *supra*, 198 Cal.App.3d at pp. 383-384.) Noting that the plaintiff failed to provide a satisfactory explanation for the inconsistency, "[t]he conclusion is inescapable that *this amendment was made solely for the purpose of avoiding a demurrer*." (*Id*. at p. 384, italics added.) Accordingly, the appellate court assumed for purposes of the appeal that the original version of events was factually correct. (*Ibid.*)

Similarly, in *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, a surgeon sued a hospital that sent a negative peer review evaluation to an affiliated health insurer, allegedly causing damages to his reputation. Underlying his claims against the hospital was the allegation that the hospital had breached a written contract with him by making the disclosure. In his original complaint the plaintiff failed to allege that his contract with the defendant contained an express agreement not to disclose the peer review evaluation, claiming it was implied only. Then, in his first amended complaint he alleged that the medical director of defendant made an express oral contract of nondisclosure. In the absence of a satisfactory explanation as to why he changed this allegation, the court held the lower court was justified in concluding that the doctor's breach of contract claim was a "sham." (*Id.* at pp. 1389-1391.)

As discussed in the factual summary above, there are satisfactory explanations set forth in the SAC for not naming Penfold in the original complaint. It is not unusual for the correct entities to be determined during discovery. (Weil & Brown, Cal. Practice Guide: Civil Procedure before Trial (The Rutter Group 2012) ¶ 6:57, p. 6-15.) This is not a case where Moulton was abusing the judicial process such that the sham pleading doctrine should have been applied. *(Amid v. Hawthorne Community Medical Group, Inc., supra,* 212 Cal.App.3d at p. 1391.) The trial court here did not weigh the explanation for the amendment nor did the court decide that the SAC was a sham made solely to avoid the demurrer.

Thus, the trial court was required to ignore the original complaint and assume the truth of the allegations in the SAC, which it did not do.

3. It was an abuse of discretion to deny leave to amend.

We review the trial court's decision to deny Moulton leave to amend his complaint for abuse of discretion. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-297.) We must reverse for abuse of discretion if we determine there is a reasonable possibility that the pleading can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) It was an abuse of discretion to deny leave to amend for two fundamental reasons. First, it was legal error to ignore the material facts of the SAC. Second, even if the allegations of the FAC are not entirely clear as to each possible theory or cause of action, those too can be clarified by amendment leading to possible causes of action. For example, Moulton claims he can state a claim for a partnership by estoppel. By ignoring the allegations as to Penfold in the SAC, the trial court erroneously failed to rule on the merits of this possible claim. As in *Schifando*, the trial court abuses its discretion if there is a reasonable possibility that the SAC can be amended.

The trial court decided that the allegations of the SAC did not meet the very specific pleading requirements for a partnership by estoppel, relying on *Moen v. Art's Café* (1950) 95 Cal.App.2d 577, 579. We note the three-page *Moen* decision can hardly be described as setting forth a reasoned pleading requirement analysis as it was an appeal following a trial, not as here, on demurrer. Nevertheless, we do not disagree that "[a] plaintiff who relies upon the doctrine of equitable estoppel . . . must plead the facts establishing such an estoppel . . . ." (*Ibid.*) Here, however, the trial court did not, as required, find that Moulton had no reasonable possibility to amend the complaint. That weighing is absent from the decision.

Although many facts are sprinkled throughout the SAC that may separately or collectively amount to estoppel or other causes of action, it is not clear which facts are being relied on to support one cause of action or another. Moulton can cure the issues in the SAC, but we do not analyze what is not yet before us. We conclude that Moulton

deserves one last chance to succinctly set forth all the facts supporting each claim. We believe that these issues are more properly decided by the trial court when, or if, a demurrer or summary judgment is filed after the next amended complaint. For these reasons we conclude that the trial court abused its discretion in denying leave to amend.

III.
DISPOSITION

The order sustaining the demurrer without leave to amend is reversed, and the matter is remanded for proceedings consistent with this opinion. Appellant is awarded costs.

_____
Baskin, J.*

We concur:

_____
Ruvolo, P.J.

_____
Reardon, J.

* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.